IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No.————

GLOBE INDEMNITY COMPANY, *Petitioner*,

v.

GULF PORTLAND CEMENT COMPANY, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Courts Below

The opinion of the trial court is found in the Transcript of the Record (R. 27).

The opinion of the Circuit Court of Appeals is found in the Transcript of the Record (R. 154). It is reported in 149 Fed. (2d) 196.

Jurisdiction of this Court

This is a case in which Federal jurisdiction is based on the

diversity of citizenship. It involves a policy of insurance issued in Texas and governed by the Texas law. The trial court decided the case in accordance with Texas law. The United States Circuit Court of Appeals reversed the trial court's decision, basing its ruling on general principles of law contained in one of its own prior decisions, disregarding the applicable decisions of the State courts.

This Court clearly has jurisdiction under Section 240(a) of the JUDICIAL CODE, as amended (Acts Feb. 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938, Title 28, U.S.C, Sec. 347).

Statement of the Case

The Statement of the Matter Involved appearing in the foregoing Petition for Writ of Certiorari is adopted as a Statement of the Case in this Brief.

Specification of Errors

1. The court erred in construing the policy of insurance in controversy in accordance with general rules of Federal law without undertaking to determine its proper construction under the law of the State of Texas.

2. The court erred in basing its judgment upon a construction of the insurance policy in controversy which is contrary to the construction which must be given it under the law of the State of Texas.

3. The court erred in refusing to construe the policy of insurance in question in accordance with the law of the State of Texas, as announced by the Court of Civil Appeals for the Second Supreme Judicial District of Texas in the case of OCEAN ACCIDENT & GUARANTEE CORPORATION, LTD., OF LONDON, ENGLAND, v. NORTHERN TEXAS TRACTION COMPANY, 224 S.W. 212.

4. The court erred in construing the policy of insurance in controversy directly contrary to the law of the State of Texas, as announced by the Court of Civil Appeals for the Second Supreme Judicial District of Texas in the case of PANHANDLE STEEL PRODUCTS COMPANY v. FIDELITY UNION CASUALTY COMPANY, 23 S.W. (2d) 799.

5. The court erred in failing to hold that the injuries with respect to which indemnity was sought in this case were excluded by the policy, because the policy contained a specific provision that it should not cover in respect of bodily injuries or death caused by work done for the insured by an independent contractor or by new construction work, and under the law of the State of Texas, as announced by the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas in the case of MARYLAND CASUALTY COMPANY v. TEXAS FIREPROOF STORAGE COMPANY, 69 S.W. (2d) 826, in which a writ of error was refused by the Supreme Court of Texas, this language must be given full effect and is not to be held to be ambiguous or ineffective because it qualifies and limits the language of the policy defining general coverage.

6. The court erred in holding that the injuries with respect to which indemnity was sought in this case were covered by the policy, because the policy contained a specific provision that it should not cover in respect of bodily injuries or death caused by work done for the insured by any independent contractor or by new construction work, and under the law of the State of Texas the court could not by construction qualify or restrict such provision of the policy or refuse to give it full force and effect.

7. The court erred in construing the policy in question to the effect that the injuries caused by work done by an independent contractor or new construction work were not

excluded from coverage in cases where the insured's operations or negligence concurred with work or negligence of an independent contractor, or in cases where the instrumentalities used in cement manufacturing, either negligently contributed to such injuries or were the proximate cause thereof, because such a construction of the policy limits the operation of the exclusion clauses in question to cases where the excluded operations would be the sole proximate cause of the injuries, and such a construction is violative of the law of the State of Texas.

8. The court erred in construing the policy in question to the effect that injuries caused by work done by an independent contractor or new construction work were not excluded from coverage in cases where the insured's operations, or negligence, concurred with work or negligence of an independent contractor, or in cases where the instrumentalities used in cement manufacturing either negligently contributed to such injuries or were the proximate cause thereof, because under the policy as properly construed, in accordance with the law of Texas, the language used in the policy expressed the clear intention to insure against injuries received in ordinary operations of the insured, but not to insure against injuries sustained by reason of additional risks incident to work of an independent contractor or new construction work, and injuries incident to such additional risks were excluded whether accompanied by risks and dangers of ordinary operations or not, it being the manifest intention of the parties that exposure to either ordinary or negligent operation of the insured's plant and facilities, if sustained by reason of the work of an independent contractor or new construction work and as an incident thereto, should not be covered by the policy.

9. The court erred in construing the policy in question

to the effect that injuries caused by work done by an independent contractor or new construction work were not excluded from coverage in cases where the insured's operations, or negligence, concurred with work or negligence of an independent contractor, or in cases where the instrumentalities used in cement manufacturing either negligently contributed to such injuries or were the proximate cause thereof, because, under the policy as properly construed in accordance with the law of Texas, the policy excluded injuries sustained by reason of the performance of work done by an independent contractor or new construction work and as an incident thereto, regardless of whether negligent or ordinary operation of the business of the insured was a concurrent proximate cause of such injuries or a contributing cause or not, the test of inclusion or exclusion not being whether the operation of the business of the insured was or was not a concurrent proximate cause or a contributing cause of the injuries, but simply whether the injuries were sustained by reason of the performance of such excluded work and as an incident thereto.

10. The court erred in holding in effect that the term "caused by," as used in the clause defining coverage, would include injuries concurrently caused by operation of the cement plant and acts incident to work done by an independent contractor or new construction work, but that the same term, when used in the exclusion clauses of the policy, would not include injuries resulting from such concurrent causes, since under the law of the State of Texas the policy should be so construed as to give said term a consistent meaning.

11. The court erred in holding that the Petitioner was obligated to defend the claims for which indemnity is sought in this case because under the specific terms of the policy in controversy the obligation to defend extended only

to claims for injuries covered by the policy, and under the rule of the State of Texas, as announced by the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas in the case of TEXAS INDEMNITY INSURANCE COMPANY v. MCCLELLAND, 80 S.W. (2d) 1101, the Petitioner was not obligated under such a policy to defend against claims based on injuries not covered by the policy.

12. The court erred in reversing the judgment of the trial court and directing it to enter judgment for Respondent, because the judgment sought by Respondent is for indemnity and reimbursement of expenses incurred by it in defending and disposing of claims of persons injured while engaged at work for an independent contractor and on new construction work, and the policy of insurance under which such indemnity is sought, when properly construed in accordance with the law of the State of Texas, does not obligate Petitioner to indemnify Respondent with respect to such injuries or to defend claims based thereon.

ARGUMENT

First Point. **The Circuit Court of Appeals erred in basing its decision in this case on a general rule of Federal Law and refusing to apply the decisions of the courts of the State of Texas to the case.**

Argument Under First Point

The policy in question expressly limits both the obligation to indemnify and the obligation to defend suits to accidents involving bodily injuries to which the policy applies.

It affirmatively covers injuries suffered or alleged to have been suffered by any person while at Respondent's cement

plant if caused by the operation of the work described in the policy, namely, cement manufacturing. It affirmatively provides that it does not cover in respect of bodily injuries caused by work done for the insured by any independent contractor or injuries caused by new construction work.

The obligation to defend could not, under the law of the State of Texas, be extended to cover injuries not covered by the policy. TEXAS INDEMNITY COMPANY v. MCCLELLAND, 80 S.W. (2d) 1101; UNITED STATES FIDELITY & GUARANTY COMPANY v. BALDWIN MOTOR COMPANY, 34 S.W. (2d) 815.

The Record contains a typical petition (R. 37-44), illustrating the allegations made by the injured parties in the suits filed in the State court to recover from the Respondent damages for which indemnity is sought against Petitioner in this suit.

This typical petition alleges only acts of passive negligence on the part of the Respondent but affirmatively alleges facts showing that the direct and immediate cause of the injuries was the work done by an independent contractor in erecting a pile driving machine on the Respondent's premises.

The Circuit Court of Appeals construed the petition, in effect, as alleging that the injuries were caused by a combination or concurrence of the work of the independent contractor and the operation of the cement plant. It then held that the clauses in the policy providing that it should not cover injuries caused by work done by an independent contractor or injuries caused by new construction work did not exclude coverage in instances where the insured's operations or negligence concurred with the work or negligence of an independent contractor, or where the instrumentalities used in cement manufacturing by the insured either negligently contributed to such injuries or were the proximate cause thereof.

In reaching this conclusion as to the meaning of the language used in the policy, the Circuit Court of Appeals treated the matter as an original question, except for its own decision in the case of DIXIE PINE PRODUCTS COMPANY v. MARYLAND CASUALTY COMPANY, 133 Fed. (2d) 583, a case appealed to that court from the District Court of the United States for the Southern District of Mississippi, involving a policy covering property in the State of Mississippi.

The case was cited by the court as establishing the general rule of law that in construing a policy of insurance, the word "cause" ordinarily is synonymous in legal intendment with the term "proximate cause."

Petitioner does not at this time undertake to argue the question of whether the rule adverted to by the court would, even if applicable to a case arising from Texas, logically support or justify the conclusion reached by the court on the merits of the case. The point here made is that this was the only authority cited by the court in support of its construction of the policy, and that the case cited was not in anywise a decision announcing the law of the State of Texas. It was merely the pronouncement of a general rule of law applying to a state of facts arising in the State of Mississippi.

Not only did the Circuit Court cite no Texas cases in support of its ruling, it did not discuss or consider the Texas decisions cited and relied upon by the trial court.

The trial court based his decision primarily upon the holding of the Court of Civil Appeals for the Second Supreme Judicial District of Texas in the case of OCEAN ACCIDENT & GUARANTEE CORPORATION, LTD., OF LONDON, ENGLAND, v. NORTHERN TEXAS TRACTION COMPANY, 224 S.W. 212, wherein the court held that the phrase "caused by the performance of the work" as used in an indemnity policy was not limited to injuries proximately caused by such

work but should be interpreted as including injuries sustained by reason of the performance of the work and as an incident thereto.

It thus appears that whereas the trial court undertook in this case to determine the construction of the policy in question in accordance with the laws of the State of Texas and found in the Texas decisions authority for its ruling, the Circuit Court of Appeals, without even discussing the cases cited by the trial court or any other Texas cases, reversed the decision of the trial court and rendered judgment to the contrary.

There is no general rule in Texas that the phrase "caused by" when used in an indemnity policy of insurance means "proximately caused by," as the case above cited demonstrates, and the Circuit Court of Appeals did not follow the Texas law on this point.

Another respect in which the Circuit Court of Appeals failed to follow the law of the State of Texas is that it arbitrarily refused to give the exclusion clauses effect, because to do so would limit the general coverage of the policy. The court reasoned that since these clauses did not, by their express language, exclude coverage in instances where the insured's operations or negligence concurred with the work or negligence of an independent contractor to produce an injury to one on the premises of the insured, they could not be construed as applying to such cases. Such reasoning and holdling is contrary to the rule of construction applied by the Texas courts in such cases.

The trial court applied the true rule and cited a Texas case announcing it. This was the case of MARYLAND CASUALTY COMPANY v. TEXAS FIREPROOF STORAGE COMPANY, 69 S.W. (2d) 826, a decision by the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas, in which writ of error was refused by the Supreme Court of Texas.

In that case the court announced the rule that an exclusion clause in a policy of indemnity insurance was not to be considered ambiguous merely because its language limited the language providing for general coverage, and the court held that the exclusion clause in that case should be given effect according to its plain meaning even though it did result in excluding liability otherwise covered by the policy.

The Circuit Court of Appeals, however, apparently held the exclusion clauses ambiguous because they limited the general coverage but did not do so by express language.

Giving effect and meaning to the plain language of the exclusion clauses in the light of the rule announced and followed by the Texas courts, they would apply to the case at bar and the Circuit Court of Appeals erred in refusing to follow the State law on this point.

That the Circuit Court was bound to follow the local law in cases of diversity of citizenship is now well settled. ERIE RAILROAD COMPANY v. TOMPKINS, 304 U.S. 64; RUHLIN v. NEW YORK LIFE INSURANCE COMPANY, 304 U.S. 202; NEW YORK LIFE INSURANCE COMPANY v. JACKSON, 304 U.S. 261; ROSENTHAL v. NEW YORK LIFE INSURANCE COMPANY, 304 U.S. 263; MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION v. BOWMAN, 304 U.S. 549.

Even though the applicable local decisions be found only in decisions of an intermediate State court, they must be followed by the Circuit Court of Appeals. FIDELITY UNION TRUST COMPANY v. FIELD, 311 U.S. 169; WEST v. AMERICAN TELEPHONE & TELEGRAPH COMPANY, 311 U.S. 223; SIX COMPANIES OF CALIFORNIA v. JOINT HIGHWAY DISTRICT NO. 13, 311 U.S. 180; STONER v. NEW YORK LIFE INSURANCE COMPANY, 311 U.S. 464.

Second Point. **The Circuit Court of Appeals has in**

this case decided an important question of local law in a way that is in conflict with applicable local decisions.

Argument Under Second Point

The holding of the Circuit Court of Appeals in this case is directly contra to the holding of the Court of Civil Appeals for the Second Supreme Judicial District of Texas in the case of PANHANDLE STEEL PRODUCTS COMPANY v. FIDELITY UNION CASUALTY COMPANY, 23 S.W. (2d) 799.

The policy, by its language, expressly stated that it did not cover injuries caused by work done by an independent contractor or injuries caused by new construction work.

The Circuit Court of Appeals, however, construed the policy to the effect that the clauses excluding liability would not apply in cases where acts done in the usual operation of the business concurred with acts done by an independent contractor or in new construction work to cause the injuries.

This the court did as a process of reasoning and construction which is directly contrary to the reasoning of the court and the construction given by the court to a substantially similar policy in the case above cited.

In that case an insurer which carried a liability policy on a motor truck sought to invoke as a defense in a suit brought by its assured for indemnity the provisions in its policy reducing its liability in the event the injuries covered by its policy were also covered by the policy of another insurer.

In support of its defense it urged that the injuries in question were covered by a policy issued by another company insuring against loss from liability imposed by law upon the assured for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by any person or per-

sons not in the employ of the assured by reason of the prosecution of the work of said assured.

This policy contained a specific provision that it did not cover bodily injuries caused by any horse, draft animal, or vehicle owned, hired, maintained or used by the assured, or caused by any person while in charge thereof.

One of the questions before the court was whether the latter policy covered injuries to a person passing along a sidewalk when struck by a steel beam being unloaded from a truck belonging to the assured by the assured's employee in charge thereof in the usual course of the assured's business.

The court held that the use of the truck in the prosecution of the work of the assured was a proximate cause of the injury but that the exclusion clause applied. The reasoning and holding of the court is embraced in this language:

> "It cannot be doubted that the act of Lewis and his associates in unloading the beam from the truck was the direct and immediate cause of the injury to Miss Godley, and we believe that by reason of that fact the losses from that injury were excluded and excepted from the operation of the main liability clause of the policy issued by the Federal Surety Company. * * * Logically and manifestly, if the immediate cause of the injury referred to, which was the last link in the chain of circumstances leading up to the injury, was excluded from the liability provision of the Federal Surety Company policy, then necessarily that excluded also the primary cause, to-wit, the use of the truck, since the latter could not become effective in the absence of the former."

It thus appears that the reasoning and holding of the court in the case cited is directly contrary to the reasoning and holding of the Circuit Court of Appeals in this case. In the

case cited, the court reasoned that where an act which was a direct and immediate cause of an injury otherwise covered by the policy was excluded from the policy coverage, the exclusion provision should logically be given effect. The Circuit Court of Appeals reasoned directly to the contrary and held that the exclusion clause should not be given effect even though the act excluded by the policy was the direct and immediate cause of an injury otherwise covered by the policy.

Manufacturer's public liability policies are widely used. It is a matter of general importance to both insurers and the insured that the construction of these policies not turn on the fortuitous circumstance of whether liability under the policy is sought to be enforced in the Federal court or in the State court.

This writ should, therefore, be granted in order that the Circuit Court of Appeals may be required to make its opinion on the controlling point in this case conform to the decisions of the State court on the question.

Third Point. **By refusing to determine and apply the local law to the decision of the case, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision.**

Argument Under Third Point

The duty of the Circuit Court of Appeals to apply the State law to the decision of this case is now firmly determined and settled by the decisions of this Court. The refusal of the Circuit Court to apply the rule of decision of the Texas courts to the case is, therefore, a departure from the accepted and usual course of judicial proceedings. Unless this Court exercises its supervisory power to require the Cir-

cuit Court of Appeals to determine the case in accordance with the State law the rule announced in ERIE RAILROAD COMPANY v. TOMPKINS, 304 U.S. 64, would be meaningless and empty.

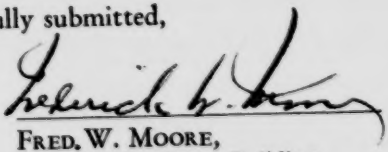
The court in the following cases granted the Writ, reversed the judgment of the Circuit Court and remanded the question to the Circuit Court with instructions to apply the State law. NEW YORK LIFE INSURANCE COMPANY v. JACKSON, 304 U.S. 261; ROSENTHAL v. NEW YORK LIFE INSURANCE COMPANY, 304 U.S. 263; MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION v. BOWMAN, 304 U.S. 549.

If the Court does not grant the Writ in its entirety, it should, under the circumstances of this case, at least reverse the judgment of the Circuit Court of Appeals and remand the case with instructions to determine and apply the State law to the decision of the case.

Conclusion

In conclusion it is respectfully submitted that the relief prayed for in the foregoing Petition for Writ of Certiorari should be granted.

Respectfully submitted,



FRED. W. MOORE,
915 Petroleum Building,
Houston 2, Texas,
Attorney for Petitioner

Of Counsel:
W. J. KNIGHT